**IN THE HIGH COURT OF TANZANIA**
**(DAR ES SALAM DISTRICT REGISTRY)**
**AT DAR ES SALAAM**

**CIVIL APPEAL NO 63 OF 2021**

(Originating from Civil Application No. 445 of 2020 before the Juvenile Court of Dar es Salaam at Kisutu.Hon.Lyimo)

**SAAD SALIM MAKULE.....APPELLANT**

**Versus**

**FARIDA MARTIN ILAMFYA.....RESPONDENT**

**JUDGEMENT**

Last Order 11/2/2022
Date of Judgement 18/2/2022

**MASABO, J.**

The judgment is in respect of an appeal emanating from Civil Application No.445 of 2020 before the Juvenile Court of Dar es Salaam at Kisutu. The record has it that, at the trial court the respondent successfully applied for maintenance orders against the appellant who is the biological father of their child named ASM (name abbreviated) aged 5 years. She preferred the application because the appellant dodged his parental duties of maintaining the child since February, 2019. The appellant was ordered to provide a monthly maintenance fee at a tune of Tshs 100,000/= which has angered him thence this appeal.

In his memorandum of appeal, he has paraded four grounds of appeal as follows: **One** the trial court did not take into account his application for custody of the child. **Second,** the trial magistrate erred in law and procedure

by ordering payment of Tsh100,000/=without inquiring the status/ the appellant's ability to maintain the child. **Third,** the trial court did not inquire the ability of the Respondent to maintain the child. And, **four,** that the trial court did not take into account the circumstances that engineered the breakdown of their marriage.

Hearing of the appeal proceeded in writing. All the parties were unrepresented. In his written submission, the appellant submitted that the monthly maintenance fee prescribed by the court is excessive as he has neither a permanent job nor reliable source of income. Besides, he has a family with six children who all depend on him for living. Thus, it is difficult for him to raise the amount of Tshs 100,000/= just for one child. He prayed that the child be placed under his custody so that it is maintained in a similar manner as the other six children. Fortifying his point, he cited the case of **Halima Kahema v Jayantilal G. Kiria** (1987) HCD 147 where it was held that "*Welfare of the child should requires that the child be in the hands of either of the parents'*. Based on this he argued that, there is no reasons why the infant should not be placed under his custody as he is the biological further.

Coming to the second ground of appeal, he argued that, Tsh100.000/= is an unbearable burden as it consumes all his monthly earning and leaves him with nothing for maintenance of the six children. He proceeded that, had the court bothered to inquire his financial status, it would have arrived at a different finding which would have created equality between the children.

Moreover, he cited section 8(1) of the Law of the Child Act (Cap 13 RE 2019) and argued that, child maintenance is a responsibility of both parents. Thus, it should vest on the appellant as well as the respondent. Lastly, he submitted that, the reason leading to dissolution of marriage was the appellants failure to provide Tshs 300,000/= per month for household groceries and maintenance. This proves his inability to pay the prescribe amount.

On her side, the respondent submitted that, section 26(2) of the Child Act(supra) provides that there is a rebuttable presumption that it is in the best interest of the infant below the age of seven years to be placed under the custody of his/her mother save where the undesirability of disturbing the life of the infant by changes of custody dictates otherwise. Therefore, it was proper for the court to place the infant under her custody. In fortification, she cited the case of ***Martine v Grace Christopher,*** Civil Appeal No. 68 of 2003HC at Dar es Salaam, ***Celestine Kilala and Halima Yusufu v Restuta Celestistine Kilala*** (1980) TLR 76 and section 4(2) of the Law of the Child Act (supra). In further amplification of this point, she cited **Sajjad Ibrahim Dharamsi &another v Shabbir Gulamabas Nathan** (Civil Appeal No 42 of 2020) where it was held that since the Law of the Child is silent on what is embedded in the best interest of the child, the court has a role to liberally interpret and decide cases in accordance with the circumstances of each case.

Regarding averments as to unreliable source of income she replied that they are a fabricated as no proof was rendered to show that the appellant was terminated and that he has no source of income. She submitted further that the allegation contradicts the uncontroverted lower court record which show that the appellant is employed by JAI institute and has a retail shop although he failed to disclose the amount earned. It was further argued that, the averment that the appellant has 2 wives and 6 children is unfounded as no birth certificate or any proof was rendered as to the existence of these children.

Concerning the shared responsibility for maintenance of the child, the respondent argued that, much as she is aware that she too has a shared legal responsibility to provide for the child, pursuant to section 41 of the Law of the Child Act, her means are too limited. She works as a hawker engaged in selling clothes to sustain her life and upkeep of the child. Her earning per day is between 3000 to 5000/- and some of the days she retires without any earning. Because of this, it has become difficult for her to maintain the infant. In the alternative, she argued in all the period when the appellant neglected his duty she was single handedly maintaining the infant by providing her with physical care, food, shelter, clothing entertainment and through payments for utility bills and school related expenses.

On the last ground she submitted that maintenance has nothing to do with the breakdown of the marriage. It is neither a witch hunt mission or a punishment to the one found to have engineered the breakdown. Thus, it

should not be entertained. The court should fucus on the maintenance prayer which is solely meant to provide for the needs of the child.

Rejoining, the appellant reiterated that, custody of an infant below the age of 7 may be placed under the biological farther where the circumstances so demand (*Andrew Martine v Grace Christopher*) and prayed that this court be pleased to place the child under his custody as prior to divorce, the infant was living with both parents under the same roof. He added that it would have been in the interest of justice for the trial court to obtain opinion of a neutral person such as a social welfare officer to investigate the life station of each of the parents. He distinguished the case of *Martine's* (supra) to the instant one and submitted that in Martine's (supra) the biological father was living with a girlfriend who was not even ready to take care of their children in question, It was also argued that the case of *Sajjad Ibrahim Dhahim & another* (supra) is distinguishable as it involved a step farther and an uncle against a biological mother of the child in question whereas in the instant case, the appellant is the biological father of the infant. He stressed his arguments with a case of **Robert Leo Daud v Cecilia Makingo Bunga**, (PC) Civil appeal No. 67 of 2018, High Court of Tanzania, Dar es Salaam in which the child was placed under the custody of the father. Lastly, he reiterated that much as he serves as general secretary for JAI institute, he is not employed by the institute. He and other leaders and members of this organization are not paid for their work. they work for free expecting for reward and blessing from *Allah.*

This court has dispassionately considered the submissions in support and in opposition of the appeal. The fist issues emerging from these grounds and submissions is whether the court erred in placing the infant under the custody of the respondent. Section 39(1) and (2) of the Law of the Child Act (supra) mandates the court to place a child under the custody of parents, guardian or a relative of the child upon consideration of the overriding best interest of the child and the importance of a child being with his mother and other factors such as the rights of the child, the age and sex of the child; desirability of keeping the siblings together, the need for continuity in the care and control of the child and the views of the child, if he/she is capable of giving an independent view regarding her welfare.

In the present case the records reveal that custody was not at issue in the lower court. The respondent moved the court exclusively for maintenance orders. This being the case, I am of the considered view that it would amount to a serious misdirection to labour on this matter which was not canvassed in the lower court. The first ground of appeal consequently fails. For similar grounds, I will totally disregard the 4th ground of appeal which dwells on the ground leading to breakdown of the marriage between the parties as it was not at issue in the lower court.

This leaves us with the 2nd and 3rd ground of appeal which all revolve around the quantum of the maintenance and the question to be answered is whether Tshs 100,000/= awarded by the trial court as maintenance is excessive. To derive a point, three minor questions need be determined, **one** who

(between the father and mother, has the duty to maintain the child, **two,** what consideration should the court have in determining the quantum, and **three,** did the lower court correctly asses the quantum?

Starting with the first sub question, the Law of the Child Act (supra) while underlining the duty of the biological farther to maintain his child (section 43), considers maintenance of a child as a collective enterprise shared by both parents. Section 8(1) of this Act specifically states that, it is the duty of a parent to maintain the child by providing it with food, shelter, clothing, medical care, education and other necessities of life. The factors to be considered by court when making orders for maintenance are exemplified under section 44 of the Act which provides that:

> A court shall consider the following matters when making a maintenance order-
> (a) the income and wealth of both parents of the child or of the person legally liable to maintain the child;
> (b) any impairment of the earning capacity of the person with a duty to maintain the child;
> (c) the financial responsibility of the person with respect to the maintenance of other children;
> (d) the cost of living in the area where the child is resident; and
> (e) the rights of the child under this Act.

The applicant has passionately argued that the quantum of Tsh100.000/= is an unbearable burden as it consumes all his monthly earning and leaves him with nothing to maintain his six children and 2 wives. He has also complained that the amount was arbitrary determined as the court did not bother to

inquire his financial status and in particular the fact that he is unemployed and has no alternative source of income. According to the records, the respondent had prayed for Tsh 150,000/= a quantum which was sternly disputed by the appellant who asserted that he has no reliable income as his teaching post has been terminated. He also asserted that, following the termination of his employment he currently depends on help from JAI institution where he gets Tshs 3000 to 4000 per day (but not every day). It was his further averment that he has 2 wives and five children although he later said, he had a total of 5 children born in 1984, 1999, 2014, 2016, and 2015.

As correctly argued by the respondent, none of these averments were substantiated. The appellant rendered neither a termination letter to substantiate the assertion that he had no reliable income nor did he render the birth certificates to substantiate the number of his dependents. As for the averment that he has 6 children, giving the appellant the benefit of doubt, I examined the details of his children as appearing in the court record with a lot of interest. Unfortunate to the appellant, in the end of the scrutiny I concluded that, it was not a good excuse as the alleged birth dates of the 5 children show that of the 5 children, only 3 were under the age of majority hence dependent on the appellant. The first two children (the ones born in 1984 and 1999) were of the age majority.

The appellant has complained that the court erred by not commissioning a social inquiry on his status of life. I find no merit in this point because, much

as the court is mandated to commission a social welfare officer to conduct an inquiry, the commissioning of social injury is not a mandatory requirement. The court has option to proceed without the social inquiry as it did in the instant case.

In the view of the foregoing and considering the costs of living vis-a-vis the parents duty to provide the child with the necessities of life, I find no reason to fault the finding of the lower court as the quantum awarded appear to be modest and only capable of covering the very basic needs for the child's growth. The appeal is therefore dismissed with no costs.

DATED at DAR ES SALAAM this 18th day of February 2022.

X _____

Signed by: J.L.MASABO

J.L. MASABO

JUDGE